

## Wage and Hour Division, Labor

## § 779.324

sale of goods as such). In determining whether such an installation is incidental to a retail sale or constitutes a nonretail construction activity, it is necessary to consider the general characteristics of the entire transaction. Where one or more of the following conditions are present, the installation will normally be considered a construction activity rather than incidental to a retail sale:

(1) The cost to the purchaser of the installation in relation to the sale price of the goods is substantial;

(2) The installation involves substantial structural changes, extensive labor, planning or the use of specialized equipment;

(3) The goods are being installed in conjunction with the construction of a new home or other structure; or

(4) The goods installed are of a specialized type which the general consuming public does not ordinarily have occasion to use.

(e) An auxiliary employee of an exempt retail or service establishment performing clerical, maintenance, or custodial work in the exempt establishment which is related to the establishment's construction activities will, for enforcement purposes, be considered exempt in any workweek if no more than 20 percent of his time is spent in such work.

### "RECOGNIZED" AS RETAIL "IN THE PARTICULAR INDUSTRY"

#### § 779.322 Second requirement for qualifying as a "retail or service establishment."

If the business is one to which the retail concept is applicable then the second requirement for qualifying as a "retail or service establishment" within that term's statutory definition is that 75 percent of the establishment's annual dollar volume must be derived from sales of goods or services (or of both) which are recognized as retail sales or services in the particular industry. Under the Act, this requirement is distinct from the requirement that 75 percent of annual dollar volume be from sales of goods or services "not for resale" (§ 779.329); many sales which are not for resale lack a retail concept and the fact that a sale is not for resale cannot establish that it is recognized

as retail in a particular industry. (See *Wirtz v. Steepleton General Tire Co.*, 383 U.S. 190.) To determine whether the sales or services of an establishment are recognized as retail sales or services in the particular industry, we must inquire into what is meant by the terms "recognized" and "in the particular industry," and into the functions of the Secretary and the courts in determining whether the sales are recognized as retail in the industry.

#### § 779.323 Particular industry.

In order to determine whether a sale or service is recognized as a retail sale or service in the "particular industry" it is necessary to identify the "particular" industry to which the sale or service belongs. Some situations are clear and present no difficulty. The sale of clothes, for example, belongs to the clothing industry and the sale of ice belongs to the ice industry. In other situations, a sale or service is not so easily earmarked and a wide area of overlapping exists. Household appliances are sold by public utilities as well as by department stores and by stores specializing in the sale of such goods; and tires are sold by manufacturers' outlets, by independent tire dealers and by other types of outlets. In these cases, a fair determination as to whether a sale or service is recognized as retail in the "particular" industry may be made by giving to the term "industry" its broad statutory definition as a "group of industries" and thus including all industries wherein a significant quantity of the particular product or service is sold. For example, in determining whether a sale of lumber is a retail sale, it is the recognition the sale of lumber occupies in the lumber industry generally which decides its character rather than the recognition such sales occupies in any branch of that industry.

#### § 779.324 Recognition "in."

The express terms of the statutory provision requires the "recognition" to be "in" the industry and not "by" the industry. Thus, the basis for the determination as to what is recognized as retail "in the particular industry" is wider and greater than the views of an employer in a trade or business, or an